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No. 926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PETER L. SALEMI, *Petitioner*

v.

DUFFY CONSTRUCTION CORPORATION, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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REPLY BRIEF FOR PETITIONER

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Respondent alleges in the first line of the Brief in Opposition, hereinafter referred to as the Brief, that "This is a tort case involving *only local law.*" (Emphasis added). If a state court transcends constitutional requirements in a tort case, it is, of course, no answer to contend that the unconstitutional decision was rendered in a tort case. Does respondent mean to imply that the U. S. Constitution is not part of "local law" that the Ohio Supreme Court must also apply? Therefore, the only issue is whether, as contended in the Petition for a Writ of Certiorari, hereinafter referred

to as the Petition, that court has violated the U. S. Constitution.

On page 1 of the Brief respondent also states that the contract between petitioner and respondent did not say "one word concerning his right to enter the premises" and, on page 2, that the contract "gave him no authority to enter the premises at other than business hours. Petitioner points to no such language in it." Unfortunately, like the Supreme Court of Ohio, respondent states what, with all due respect to him, is only a half-truth. What he should have said is that the contract neither expressly authorized nor prohibited entry into the premises. It would be repetitious, although germane, to mention, with respect to this point, the arguments advanced in the Petition. See Statement of Facts, p. 15, and Argument, pp. 76-85.

Respondent alleges that the dissenting opinion did not point to a prior decision which had been overruled but a reading of the dissent would show the opposite. And respondent fails to make any comment as to the prior Ohio decisions referred to in the Petition and particularly on pp. 85-88 and 104, 105. The question of the Contract Clause is met by a pontifical statement that "There is no merit in the argument," (Brief, p. 2). No cases are cited in support of this contention. The numerous cases cited in the Petition are not analyzed, are not commented upon; nor is there any other cogent or persuasive contention made in support of the dogmatic statement that there is "no merit in the argument."

On page 2 of the Brief, respondent states that "assuming that the decision below did overrule prior law, Petitioner would have this Court disregard *stare decisis*

and overrule its own intrenched precedents (Petition, p. 57)." Many other points besides the *stare decisis* were mentioned in support of petitioner's position regarding the question of the violation of the Contract Clause by the Supreme Court of Ohio. See Petition, pp. 21-56. None of them is met or even commented upon by respondent. Furthermore, respondent fails to consider the issues with respect to the Contract Clause which do not involve overruling of prior law and which are mentioned in points II, III and IV of the Petition, pp. 62-109.

Respondent fails to make any comments regarding points V to VIII of the Petition, pp. 109-126. *They do not relate to the Contract Clause.* Point VII, for instance, is to the effect that the Supreme Court of Ohio, by invading the functions of the jury, denied to petitioner his rights under Amendment VII to the Constitution of the United States as well as under the common law. In vain does one seek even a word of refutation of this point which *alone,* if decided in favor of the petitioner by this Court, would justify reversal of the judgment of the court below.

Petitioner is also constrained to observe that respondent's failure to deny the former association of the Chief Justice of the Supreme Court of Ohio with the law firm that successfully represented the respondent before that court confirms petitioner's allegation of such association.

Finally, on page 2 of the Brief responden states:

> "At no time in this litigation until after the Supreme Court of Ohio rendered its judgment did Petitioner rely upon (1) any constitutional provision or (2) any statute (point (2) being conceded. Petition, p. 102)."

Respondent also alleged (Brief, p. 3) that it "comes too late" for petitioner to have raised in the application to the Supreme Court of Ohio for rehearing the issue that its "decision against him offended the contract clause." In addition to the argument in the Petition, pp. 102-105, it may be noted that the only case cited by respondent in support of this contention, *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128, 65 S.Ct. 1475, 1480 (1945), is not pertinent. The above-mentioned issue did not arise and could not obviously have arisen prior to the court's rendering the decision itself. After that decision the Motion for Rehearing was the earliest opportunity to present the aforesaid issue to the Supreme Court of Ohio. The motion was made pursuant to Rule IX of the Rules of Practice of that court. See Petition, p. 6.

Let us take an example—not even alluded to by respondent—of the obvious impossibility of raising a pertinent constitutional issue prior to the state court's decision. Point VII of the said Petition (p. 117) is to the effect that the Supreme Court of Ohio, *by its decision,* invaded the functions of the jury. Evidently no such issue could arise until it is mirrored in the decision itself. Not until that decision was rendered could there be raised the issue whether the decision transcends the constitutional requirements relied upon in the Petition.

Radio Station WOW, supra, cites (326 U.S. at 128, 65 S.Ct. at 1480) three cases on the question of raising an issue on a petition for rehearing presented to the highest state court:

> "*Simmerman* v. *Nebraska,* 116 U.S. 54, 6 S.Ct. 333, 29 L.Ed. 535; *Godchaux Co.* v. *Estopinal,* 251 U.S. 179, 40 S.Ct. 116, 64 L.Ed. 213; *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298."

Although these cases were not cited by the respondent, it may save the time of this Court to analyze them briefly in order to show their inapplicability in the case *sub judice.* In *Simmerman, supra,* no federal question was presented for consideration in the lower court. In the present case, as stated above, the questions presented to this Court could not have even been in existence prior to the decision of the Supreme Court. Both the trial court and the Court of Appeals had rendered opinions in favor of the petitioner and had held that he was performing duties under the contract at the time of his injury. There could, therefore, arise no issue of the violation of the Contract Clause as a result of those two decisions. It was only when the Supreme Court of Ohio held the opposite and thereby impaired the obligation of the contract of the petitioner that the issue of the violation of the Contract Clause of the U. S. Constitution could be raised and was raised on motion for rehearing before the highest state court.

In *Godchaux Co., supra,* the question of the validity of a state constitutional amendment because of conflict with the federal constitution could have obviously been raised earlier than the decision of the highest state court.

In *American Surety Co., supra,* the Court decided that there was ample opportunity prior to the decision of the highest state court to present the objection under the Fourteenth Amendment. There was no such opportunity in the instant case prior to the decision of the Supreme Court of Ohio.

The question whether there has been a waiver of a constitutional right is determined in each case on a

view of the particular rights asserted and denied. *U. S.* v. *Nudelman,* 104 F.2d 549, (1939), certiorari denied, *Nudelman* v. *U. S.,* 308 U.S. 589, 60 S.Ct. 115 (1939). In this connection, it may also be stated that it was held that the issue whether a statute under which a state taxed personal property outside the state violates the federal constitution could be considered, although first raised in a petition for rehearing. *Trust Co. of Norfolk* v. *Commonwealth,* 145 S.E. 326, 151 Va. 883 (1928), reversed on other grounds under the name *Safe Deposit and Trust Co.* v. *Commonwealth of Va.,* 280 U.S. 83, 50 S.Ct. 59 (1929).

Respectfully submitted,

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